

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FELICIA M. RYDER)	
Claimant)	
VS.)	
)	
WHEATLANDS HEALTH CARE CENTER)	
Respondent)	Docket No. 1,043,403
AND)	
)	
KANSAS ASSOCIATION OF HOMES)	
FOR THE AGING INSURANCE GROUP)	
Insurance Carrier)	

ORDER

Claimant appealed the February 14, 2014, Order entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on May 21, 2014.

APPEARANCES

Jonathan E. Voegeli of Wichita, Kansas, appeared for claimant. Michael L. Entz of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 13, 2014, motion hearing, and all pleadings contained in the administrative file.

ISSUES

Claimant injured her right shoulder, cervical spine and lumbar spine on September 9, 2008. The parties settled this claim in March 2010 with an award of disability benefits based upon claimant's whole body functional impairment of approximately 14%. In August 2012, claimant filed an application for review and modification asserting a work disability, as she was no longer employed by respondent. ALJ Clark denied claimant's request for modification of her award, finding that claimant voluntarily quit her job and was capable of earning the same or higher wages than she did at the time of her accident.

Claimant appealed and the Board entered an October 29, 2013, Order finding claimant was entitled to modification of her award. The Board remanded the matter to the ALJ for a determination of the extent of claimant's work disability in accordance with K.S.A. 44-510e. On November 20, 2013, respondent appealed the Board's Order to the Kansas Court of Appeals.

On December 16, 2013, claimant filed a Motion Requesting Calculation of Award requesting the Board calculate the award to which it found claimant was entitled. Claimant's motion indicated that subsequent to respondent's appeal to the Kansas Court of Appeals, claimant's attorney scheduled a telephone conference with the ALJ and respondent's attorney to ask for a determination of the work disability in order to assert claimant's right for continuing disability payments under K.S.A. 44-556(b). The motion went on to assert the ALJ indicated he had no authority to calculate the award and that he felt the Board's decision was incorrect. On December 27, 2013, the Board entered an Order in which it determined it would not calculate claimant's work disability as claimant did not first file a motion requesting ALJ Clark to determine claimant's work disability, nor was there an order entered by the ALJ denying claimant's request. In its Order, the Board also reminded the ALJ that it had ordered him to determine claimant's work disability, he had the authority to do so, and should do so forthwith.

On January 3, 2014, claimant filed a Motion Requesting Calculation of Award requesting the ALJ calculate claimant's work disability award. A motion hearing was held on February 13, 2014. In a February 14, 2014, Order, the ALJ determined he and the Board did not order any compensation to be paid prior to respondent's appeal of the Board's Order to the Kansas Court of Appeals; therefore, there was no compensation due. On February 18, 2014, claimant filed another Motion Requesting Calculation of Award, again requesting the Board calculate claimant's award. On February 25, 2014, claimant filed an application for review of the ALJ's February 14, 2014, Order.

Claimant requests the Board calculate the work disability award which was granted in claimant's initial appeal and remanded to the ALJ for calculation. Claimant contends she is due payments from ten weeks prior to the Board's October 29, 2013, Order and continuing to the date the Kansas Court of Appeals renders its decision. Claimant states in her brief:

Although the [Board's October 29, 2013,] decision was appealed by the Respondent before [the work disability] calculation could occur, this should not prevent the claimant from the protections intended by the legislature that prevents [*sic*] the employer from putting the employee in an injurious position during which time an appeal is pending. Claimant, although she was awarded a work disability by the Board on October 29, 2013, has not received any payments, placing her in a much more vulnerable and financially precarious position then [*sic*] the legislature intended, not because an award was not made, but because an ALJ has refused

to calculate that award. This flies in the [face] of the plain language of the statute, the legislative intent, and the very purpose of the statutory section.¹

At the motion hearing, claimant argued:

We're simply asking for a calculation so our client can get the rights that are due to them under K.S.A. [44-]556, sub set [sic] b. We're not arguing whether the compensation is due, and I think that by characterizing it as -- by characterizing this as saying no compensation is due or that it's not fully resolved, it is missing the point. Again, the Board decision is clear, there was a work disability awarded on the Review and Modification; there's no question about that. I don't think there's any question that additional compensation is due. And I think that K.S.A. [44-]556 allows for us to do that.

We're not arguing the merits of the case; that'll go up before the Court of Appeals, but that's exactly what the statute addresses is that between the time the Board awards it and the Court of Appeals makes a ruling, the client is entitled to weekly payments if the Board says that she is due compensation. And I don't think there's any question that she is due additional compensation.²

Respondent maintains claimant failed to establish good cause and just terms for modification of the existing award and that claimant's effort to modify an existing award violates the stay imposed when jurisdiction is transferred to the Kansas Court of Appeals. Respondent concludes its brief with the following:

If the Court of Appeals determines that good cause and just terms are not a fundamental part of the review and modification process, and instead find[s] that modification of an award is automatic when there is a showing of increased work disability, then it is at that point, that the ALJ can be required to mechanically recalculate an award and require payment. However, without first showing there is an amount due, Claimant's brief provides no basis for avoiding the stay imposed [by] the transfer of jurisdiction.³

Regarding K.S.A. 44-556, respondent stated at the motion hearing:

The only thing that is relieved from the stay is payments that are due under an existing award, not a modified award that hasn't been modified yet or didn't make it through the modification process. So I don't think because there's an exception for benefits due that you also read into the statute an exception for moving forward

¹ Claimant's Brief at 5 (filed Apr. 9, 2014).

² M.H. Trans. at 9-10.

³ Respondent's Brief at 5 (filed Apr. 22, 2014).

on the proceeding and making benefits due when in fact this Court has already determined that it doesn't believe benefits are due or are appropriate under 44-528.⁴

Respondent submitted there is a question of whether compensation is due and that question was before the Kansas Court of Appeals. It argued that if the ALJ's opinion is affirmed, the next step of determining what compensation is due will not be necessary.

The issue before the Board on this appeal is:

Does the Board have jurisdiction to compute claimant's award of disability benefits on review and modification when the case is pending before the Kansas Court of Appeals?

FINDINGS OF FACT

The pertinent facts and procedural history are set forth above.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-551(i)(1) states, in part:

Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2008 Supp. 44-556 states in pertinent part:

(a) Any action of the board pursuant to the workers compensation act, other than the disposition of appeals of preliminary orders or awards under K.S.A. 44-534a and amendments thereto, shall be subject to review in accordance with the act for judicial review and civil enforcement of agency actions by appeal directly to the court of appeals. Any party may appeal from a final order of the board by filing an appeal with the court of appeals within 30 days of the date of the final order. When an appeal has been filed pursuant to this section, an appellee may file a cross appeal within 20 days after the date upon which the appellee was served with notice of the appeal. Such review shall be upon questions of law.

(b) Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

⁴ M.H. Trans. at 7.

The Board does not have jurisdiction to decide this matter, as the Board's October 29, 2013, Order was appealed to the Kansas Court of Appeals and is awaiting a decision. The Board can find no authority that supports the premise that the Board can amend an order when it is on appeal to the Kansas Court of Appeals.

Claimant's December 16, 2013, Motion Requesting Calculation of Award indicated she did not request the ALJ to calculate the award of disability benefits on review and modification until after respondent appealed the Board's Order to the Kansas Court of Appeals. K.S.A. 2008 Supp. 44-556 indicates that commencement of an action for review by the Court of Appeals shall not stay the payment of compensation due for the ten-week period next preceding the Board's decision and for the period of time after the Board's decision and prior to the decision of the Court of Appeals on review. However, no compensation was due on the date respondent appealed as the amount of work disability had yet to be determined and the permanent partial disability calculations had yet to be made.

There are situations where the Board has jurisdiction to consider a matter in a claim when the original order of the Board has been appealed. For example, the Board has jurisdiction to review an ALJ's review and modification award while the original award is on appeal to the Kansas Court of Appeals. The review and modification proceeding, however, is a separate proceeding, generally with different issues than the original workers compensation proceeding. Here, claimant is asking the Board to calculate her work disability in the same review and modification proceeding she originally filed. That amounts to requesting an amendment of the Board's October 29, 2013, Order. The Board's Order in the review and modification proceeding is on appeal. While the aforementioned Order is on appeal, the Board has no jurisdiction to amend the Order.

CONCLUSION

The Board has no jurisdiction to consider claimant's appeal.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁵ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board dismisses claimant's appeal for lack of jurisdiction.

⁵ K.S.A. 2013 Supp. 44-555c(j).

IT IS SO ORDERED.

Dated this ____ day of June, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents. K.S.A. 2008 Supp. 44-556(b) provides that commencement of an action for review by the Court of Appeals shall not stay the payment of compensation due for the ten-week period next preceding the Board's decision and for the period of time after the Board's decision and prior to the decision of the Kansas Court of Appeals on review. The majority asserts there is no payment of compensation due, as a determination of the amount of claimant's work disability has not yet been determined and no permanent partial disability calculations have yet been made. However, this Board Member has no doubt the intent of the Kansas Legislature in enacting K.S.A. 2008 Supp. 44-556(b) was to require an employer to pay weekly benefits ordered by the Board, commencing ten weeks prior to the issuance of the Board's decision until the appeal is final.

There are several examples of a district court retaining jurisdiction to decide an issue in a case, while another issue is on appeal. For example, in *State v. Boswell*,⁶ the Kansas Court of Appeals ruled the district court had jurisdiction to modify the term of Boswell's probation, even though Boswell's sentencing was on appeal. A second example is where one party in a divorce appeals the division of property to the appellate court.

⁶ *State v. Boswell*, 30 Kan. App. 2d 9, 37 P.3d 40 (2001).

While the appellate court considers the matter, the district court may issue orders concerning parenting time with the parties' minor children.

BOARD MEMBER

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Honorable John D. Clark, Administrative Law Judge